

Case Summary

Joe Vanduyn appeals his probation revocation and reinstated sentence. We affirm.

Issues

Vanduyn raises two issues, which we restate as:

- I. whether the trial court properly revoked his probation;
and
- II. whether the trial court acted within its discretion when
it reinstated the remainder of his previously suspended
sentence.

Facts

Vanduyn was convicted of Class D felony stalking and Class B felony sexual misconduct with a minor in 2003. He was sentenced to three years for the stalking conviction and ten years, with four suspended to probation, for the sexual misconduct conviction. He was released from the Department of Correction (“DOC”) in June of 2007.

On August 16, 2007, the probation department filed a notice of probation violation. Vanduyn admitted that he had failed to maintain employment and failed to pay court costs and probation fees at a September 24, 2007 hearing. The trial court ordered that Vanduyn continue his probation and complete the RIGHT program, which would assist him in finding employment.

On October 16, 2007, the probation department filed a second notice of probation violation regarding Vanduyn failing a drug screen. On November 19, 2007, Vanduyn admitted that he violated probation by using marijuana. The trial court opined that it

looked like Vanduyn was “on the right road” and ordered that he continue serving his probation and working with his case manager from the RIGHT program. Tr. p. 42.

On February 8, 2008, the probation department filed a third notice of probation violation, this time naming several violations. The notice alleged that Vanduyn failed to participate in and comply with sex offender treatment, failed to complete the RIGHT program, failed to pay court costs, failed to pay probation fees, and failed a drug screen. Vanduyn had also failed to report to his probation officer and a warrant was issued for his arrest.

Officer Travis Thompson of the Anderson Police Department served the arrest warrant on Vanduyn on April 2, 2008. Vanduyn was in a friend’s house, smoking a cigarette and watching television. Officer Thompson asked Vanduyn to stand up and put his hands behind his back. Vanduyn ignored the first request, but stood up after Officer Thompson’s second request. Vanduyn refused to put his cigarette out, asked to finish it, and Officer Thompson again ordered Vanduyn to put the cigarette out and put his hands behind his back. Vanduyn continued smoking. Officer Thompson administered pepper spray, and asked Vanduyn to get down with his hands behind his back. When Vanduyn refused, Officer Thompson forcibly took him to the ground and handcuffed him. The State charged Vanduyn with Class A misdemeanor resisting law enforcement.

The trial court held a hearing on April 21, 2008. Don Allbaught, a clinical social worker conducting a sex offender treatment program, testified that Vanduyn was in the program twice, was uncooperative both times, and failed to attend. Jim Hunter, case manager with the RIGHT program, testified that Vanduyn failed to appear for his

appointments in February. Officer Thompson recounted the events leading to Vanduyn's resisting law enforcement charge. Tony New, Vanduyn's probation officer, testified to Vanduyn's positive drug screen and unwillingness to complete substance abuse treatment programs. Vanduyn admitted to smoking marijuana and missing appointments with his case manager and probation officer.

As the trial court pronounced its decision, Vanduyn exclaimed "f*** you" and the trial court added ninety days to be served for contempt. Tr. p. 110. The trial court reinstated the remaining time of Vanduyn's sentence, which was approximately two years, to be served in the DOC. This appeal followed.

Analysis

I. Probation Revocation

A defendant in a probation revocation proceeding is not entitled to the full due process rights that would be entitled to a defendant in a criminal proceeding. Terrell v. State, 886 N.E.2d 98, 100 (Ind. Ct. App. 2008) trans. denied. Probation revocation is a two-step process. First, the trial court must determine if a violation of a condition of probation occurred and if so, whether that violation warrants revocation. Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008). The due process requirements for probation revocation hearings mandate that an evidentiary hearing be held and the defendant be provided counsel and an opportunity to confront and cross-examine witnesses. Id.; Ind. Code §§ 35-38-2-3(d) & (e). A decision to revoke probation will be reviewed on appeal for an abuse of discretion. Woods, 892 N.E.2d at 639.

When a probationer admits to a violation, however, the evidentiary hearing is unnecessary and the trial court can determine whether the violation warrants revocation. Id. at 640. But “even a probationer who admits the allegations against him must still be given an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation.” Id. Vanduyn was not only given that opportunity, but also a full evidentiary hearing where he was represented by counsel.

During the hearing, Vanduyn admitted to at least two of the probation violations—using illegal drugs and failing to attend meetings with his probation officer. These violations alone would be sufficient to revoke his probation. See Smith v. State, 727 N.E.2d 763, 766 (Ind. Ct. App. 2000) (“Evidence of a single probation violation is sufficient to sustain the revocation of probation.”). Evidence of numerous additional violations was presented, including: being charged with a new crime, failing to pay requisite treatment costs, failing to attend sex offender treatment, and failing to comply with the RIGHT program. The trial court also considered the previous chances it gave Vanduyn in two prior probation revocation proceedings. Both times the trial court was lenient and ordered Vanduyn back to probation after his admitted violations. Clearly, this leniency was not effective. Vanduyn did not comply with the terms of his probation or maintain a law-abiding life.

Vanduyn also argues that there was insufficient evidence to support a charge of resisting law enforcement. Where the alleged probation violation is the commission of new crime, the State does not need to show that the probationer was convicted of the crime. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). Rather, a trial

court only needs to find that probable cause exists to believe the probationer violated a criminal law. Id. The trial court had ample evidence in the form of testimony from Officer Thompson to conclude there was probable cause that Vanduyn committed the offense of resisting law enforcement. Even assuming the charge of resisting law enforcement was improperly considered, however, it would have been harmless error. The trial court had evidence and admissions of several other probation violations, so this additional crime was unnecessary to sustain his probation revocation.

Vanduyn also argues his probation should not have been revoked for failure to meet financial obligations. The evidence showed, however, that Vanduyn missed several appointments that did not involve any financial obligation. Moreover, the trial court did not base the revocation solely on Vanduyn's failure to meet his financial obligations. The trial court did not abuse its discretion by revoking Vanduyn's probation.

II. Sentence

We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. Abernathy v. State, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). Serving a sentence in a probation program is not a right, but rather a "matter of grace" and a "conditional liberty that is a favor." Id. Specifically, Indiana Code Section 35-38-2-3(g) provides:

If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may:

(1) continue the person on probation, with or without modifying or enlarging the conditions;

- (2) extend the person's probationary period for not more than one (1) year beyond the original probationary period; or
- (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

The trial court ordered the remainder of Vanduyn's probation to be reinstated to executed time in the DOC. Vanduyn seems to argue on appeal that he would be better suited to an alternative sentence, such as a community corrections program or more probation. Vanduyn has a clear and admitted history of failing probation. The April hearing was his third time before the trial court for multiple violations during the same course of probation. It was within the trial court's discretion to order the remainder of Vanduyn's sentence to be served in the DOC.

Conclusion

The trial court had sufficient evidence to conclude that Vanduyn violated probation. It did not abuse its discretion by revoking his probation and reinstating the remainder of his sentence. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.